

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

YALE NEW HAVEN HOSPITAL

Employer/Petitioner

and

NEW ENGLAND HEALTH CARE EMPLOYEES
UNION, DISTRICT 1199

Union

Case No. 34-RM-89

DECISION AND ORDER

Upon a petition filed under Section 9(b) of the National Labor Relations Act (the Act), and pursuant to Section 3(b) of the Act and Sections 102.63(a) and 102.71 of the National Labor Relations Board's Rules and Regulations, an investigation was conducted in this matter. In accordance with that investigation, I find that New England Health Care Employees Union, District 1199 (herein called the Union) has not maintained a "present demand for recognition" of certain employees of the Employer/Petitioner (herein called the Employer) within the meaning of Section 9(c)(1)(B) of the Act. Therefore, I find that no question exists concerning the representation of certain employees of the Employer, and, for the reasons set forth in detail below, I shall dismiss the petition.

I. Facts¹

For about the past ten years, the Union has sought to organize a unit of approximately 1736 non-professional employees employed by the Employer. In the Spring of 2006, the Employer and the Union entered into an Election Principles Agreement (herein called the Agreement), which was effective by its terms from June 7, 2006 to March 7, 2007. The Agreement established certain procedures and standards of conduct to be followed by both parties in the course of the Union's organizing

¹ The facts set forth below are undisputed.

campaign, and provided for a representation election to be conducted by the Board following the filing of an election petition. The Agreement further contained, *inter alia*, a commitment by both parties that their conduct and communications to eligible employees would not disparage the other party, and would be conducted “in a factual manner, free from threats, coercion or intimidation.” The Agreement also provided for the submission of disputes arising under the Agreement to a neutral arbitrator, and that the Act would generally be the governing standard to be applied to those disputes. In addition, the arbitrator was empowered with “broad discretion to fashion broad remedies” to ensure compliance with the Agreement.

On November 16, 2006, the Union filed a petition in Case No. 34-RC-2196 seeking to represent a unit of the Employer’s full-time and regular part-time non-professional employees. On November 27, 2006, the parties entered into a Consent Election Agreement with an election scheduled for December 20, 2006. However, on December 13, 2006, the Union filed an unfair labor practice charge in Case No. 34-CA-11648 alleging, *inter alia*, that beginning in late November 2006, the Employer engaged in a series of unfair labor practices.² Although the Union subsequently voluntarily withdrew that charge, it re-filed those allegations on March 9, 2007 in Case No. 34-CA-11713. That charge culminated in a Board approved settlement providing for a Court Order requiring the Employer, *inter alia*, to cease and desist from engaging in the aforementioned unlawful conduct.

The election was blocked by the charge in Case No. 34-CA-11648. Thereafter, on February 27, 2007, having concluded that the effects of the Employer’s conduct had precluded the possibility of holding a free and fair election, the Union withdrew the petition in Case No. 34-RC-2196, and requested instead that the arbitrator issue a bargaining order as a remedy for the Employer’s conduct.³

² Namely, interrogating and polling employees about their union sentiments and activities; informing employees that they would be required to sign dues check-off authorization cards if they selected the Union; and threatening employees with changes to overtime benefits, loss of direct access to their supervisors, loss of employment, loss of bonuses, loss of overtime and overtime pay differential, and loss of job flexibility if they selected the Union to represent them.

³ At no time during the processing of the aforementioned charges did the Union seek such a remedy from the Agency.

On March 7, 2007, the Employer filed the petition in the instant case, processing of which was blocked by Case No. 34-CA-11713 until the Employer had fully complied with the aforementioned Order in that case.

Much of the evidence proffered by the Union in support of its charges had also been presented to, and considered by, the arbitrator.

On October 23, 2007, the arbitrator issued a “Final Report on Remedies”. With regard to the Union’s request for a bargaining order remedy, although the Union presented evidence which it argued established that it had a “card majority” of employees prior to the Employer’s improper conduct, the arbitrator was unable to determine whether the Union had ever attained majority status. Nevertheless, assuming that the Union had achieved majority status, the arbitrator denied the request. In so doing, the arbitrator considered prevailing Board precedent and concluded that there was an absence of “persuasive authority for an arbitrator to grant a bargaining order under the circumstances presented by this case.”⁴

There is no evidence or claim that either party has sought to overturn the arbitrator’s award.

II. The Positions of the Parties

The Employer contends that the Union’s conduct, commencing with its request for a bargaining order from the arbitrator, coupled with its current on-going organizational efforts⁵ and its failure to disclaim interest in representing the unit, constitutes a present demand for recognition within the meaning of Section 9(c)(1)(B) of the Act.

The Union does not deny that it is continuing in its efforts to obtain employee support. Rather, the Union contends that the petition must be dismissed because “there

⁴ However, as an alternative to the bargaining order remedy, based upon the Employer’s overall conduct in derogation of the Agreement, the arbitrator ordered the Employer to reimburse the Union for its organizing expenses (\$2,297,676), and to pay its employees an amount equal to that which it paid to the consultants it had hired to carry out its campaign (\$2,225,131).

⁵ There is no claim or evidence that the Union has been picketing the Employer. Rather, the Employer points to the following facts: Union organizers are a regular sight around the Employer’s entrances, and the Union continues to maintain a website, www.ynhhunion.org, dedicated to organizing the Employer, and containing a copy of an October 31, 2007, newspaper advertisement which acknowledges that the arbitrator’s award “will help us continue what has now become a 10-year struggle to gain union representation. But the bitter truth is, we still don’t have the protection of a union contract.”

is no present demand for recognition, since the Employer's conduct, including its unfair labor practices, destroyed the majority support enjoyed by the Union prior to the filing of the RM petition."⁶

III. Analysis and Conclusion

Section 9(c)(1)(B) provides that an election petition may be filed by an employer when a union presents a "claim to be recognized" as an exclusive bargaining representative. In this regard, the Board has consistently construed Section 9(c)(1)(B) to require evidence of a "present demand for recognition" before an employer's petition will be processed (*Windee's Metal Industries*, 309 NLRB 1074 (1992), citing *Martino's Complete Home Furnishings*, 145 NLRB 604 (1963)), and has specifically rejected the argument that a union's organizational efforts constitutes such a demand. See *Windee's Metal Industries*, supra, at n. 5 and cases cited therein.

Based upon the foregoing, I find that the Union's present activities, which are clearly limited to organizing the Employer's employees, does not constitute evidence of a "present demand for recognition" sufficient to support the further processing of the instant petition. More particularly, I note initially that the Union's petition in Case No. 34-RC-2196 was not accompanied by a demand for recognition. Assuming *arguendo* that its subsequent request that the arbitrator award a remedial bargaining order originally constituted a sufficient demand for recognition to have created a question concerning representation, that request was clearly abandoned after it was denied by the arbitrator in October 2007. In this regard, there is no evidence or contention that the Union has sought to challenge the decision or has otherwise made such a request before the Board or any other tribunal. At most, the Union has merely continued its organizing activities among the Employer's employees, conduct which, as noted above, does not constitute a present demand for recognition. Indeed, if it did, an employer would be able to short circuit the organizing process by filing a petition and precipitating an election at a time when a union did not have an opportunity to effectively organize. This would be clearly contrary to Congressional intent (*Windee's Metal Industries*, supra;

⁶ See, for example, the Union's opening statement in its July 23, 2007 Memorandum to the arbitrator, acknowledging that the Employer's "campaign of coercion" succeeded in its "[design] to destroy the Union's majority. . . ."

Martino's Complete Home Furnishings, supra), and, in this case, would permit the Employer to circumvent the Boards processes and potentially benefit from its unlawful conduct.

As described in detail above, the facts in the instant case clearly establish that the Union has never explicitly demanded recognition, that it no longer claims majority status, and that it has effectively abandoned its request for a bargaining order.

In reaching the above conclusion, I find no merit in the Employer's contention that the instant petition can only be dismissed if the Union disclaims interest in representing the employees in issue. In support of its contention, the Employer cites *Hotel Workers Local 737 (Jet Services, Inc.)*, 231 NLRB 1049 (1977) and *Capital Market No. 1*, 145 NLRB 1430 (1964). Neither case requires a disclaimer of interest in the absence of a demand for recognition, and both cases, which involve picketing for recognition, are clearly inapposite to the facts in the instant case.

In *Jet Services*, the Board determined that a union's disclaimer of interest was insufficient to prevent a finding that the union had picketed for a recognitional objective in violation of Section 8(b)(7)(C).⁷ In *Capital Market*, a union picketed an employer seeking immediate recognition. When the employer filed an RM petition, the union sent the employer a telegram disclaiming any further interest in obtaining a contract and withdrawing any prior request for recognition. However, it continued picketing without interruption, albeit with different picket signs, and continued to solicit employees to join the union and sign authorization cards. In such circumstances, the Board refused to dismiss the RM petition, noting that "we are unable to conclude that the Union's purported disclaimer effectively withdrew its prior unequivocal claims for immediate recognition or otherwise altered the basic immediate recognitional objective of its continued picketing." *Id.* at 1432. In reaching this conclusion, the Board specifically recognized that "a union may effectively withdraw an earlier claim for recognition, and thus remove the statutory basis for the [RM] petition." *Id.* at 1431.

Accordingly, I shall dismiss the petition.

⁷ It should be noted that conduct which is sufficient to establish a "recognitional objective" within the meaning of Section 8(b)(7)(C) may not be sufficient to establish a "present demand for recognition" within the meaning of Section 9(c)(1)(B). See *Windee's Metal Industries*, supra; *Martino's Complete Home Furnishings*, supra.

ORDER

IT IS HEREBY ORDERED that the petition is dismissed.

Right to Request Review

Under the provisions of Section 102.71 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570, or electronically pursuant to the guidance that can be found under "E-gov" on the Board's web site at www.nlr.gov. This request must be received by the Board in Washington by February 22, 2008.

Dated at Hartford, Connecticut this 8th day of February, 2008.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
National Labor Relations Board
Region 34